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NOTICE AND MOTION

Supreme Court of the United States

OCTOBER TERM, 1925

No. 278

R. H. HASSLER, INC., Plaintiff in Error,

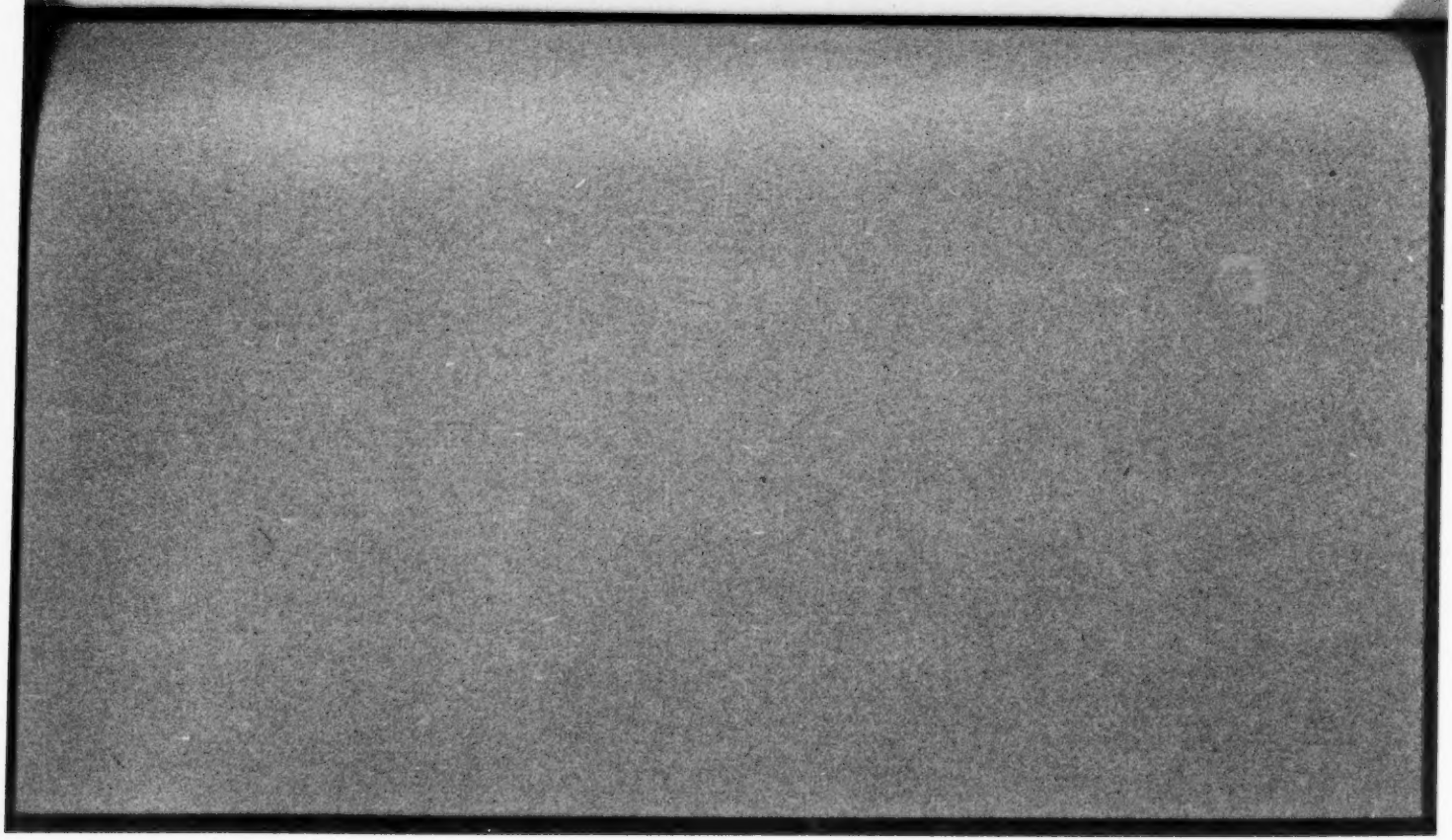
vs.

DAVID C. SHAW, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals for the Fourth Circuit

(20, 870)

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.



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NOTICE.

To Messrs. Rutledge, Hyde, Mann & Figg, Attorneys for Plaintiff in Error:

You will please take notice that upon the call of the above entitled case for trial, Defendant in Error will present the motion hereto attached.

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.

(30,870)

Supreme Court of the United States

OCTOBER TERM, 1925

No. 278

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In Error to the District Court of the United States for the Eastern District of South Carolina, Transferred from the United States Circuit Court of Appeals for the Fourth Circuit

MOTION.

Now comes the defendant in error, D. C. Shaw, and moves the Court to strike from the transcript of record herein the Bill of Exceptions as to proceedings before the Honorable Henry A. M Smith, District Judge (the same commencing on page 26 and terminating on page 71 of the said transcript), for the following reasons and upon the following grounds, to wit:

1. Because the said District Judge was without jurisdiction on June 27, 1924, when the said Bill of Exceptions was presented, settled and signed to settle and sign the

same, for the raason that (a) the time provided by the rule of Court for presenting a bill of exceptions had expired, (b) that the term at which the action was tried had ended, and (c) the defendant in error duly objected and excepted to the settlement and signing of said Bill of Exceptions.

2. The District Judge was without jurisdiction to enlarge and continue the time for presenting a Bill of Exceptions, for the reason that (a) the time provided by standing rule had expired, without an application for such enlargement having been made within said time, and (b) the term at which the cause was tried and judgement rendered had expired nearly three years prior to the attempted enlargement, without any reservation of jurisdiction over the cause.

The above motion will be made upon the record herein.

L. D. JENNINGS,
A. S. HARBY,
Attorneys for Defendant in Error.

Office Supreme Court, U. S.
FILED
FEB 25 1926
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 278.

R. H. HASSLER, INC., PLAINTIFF IN ERROR,

vs.

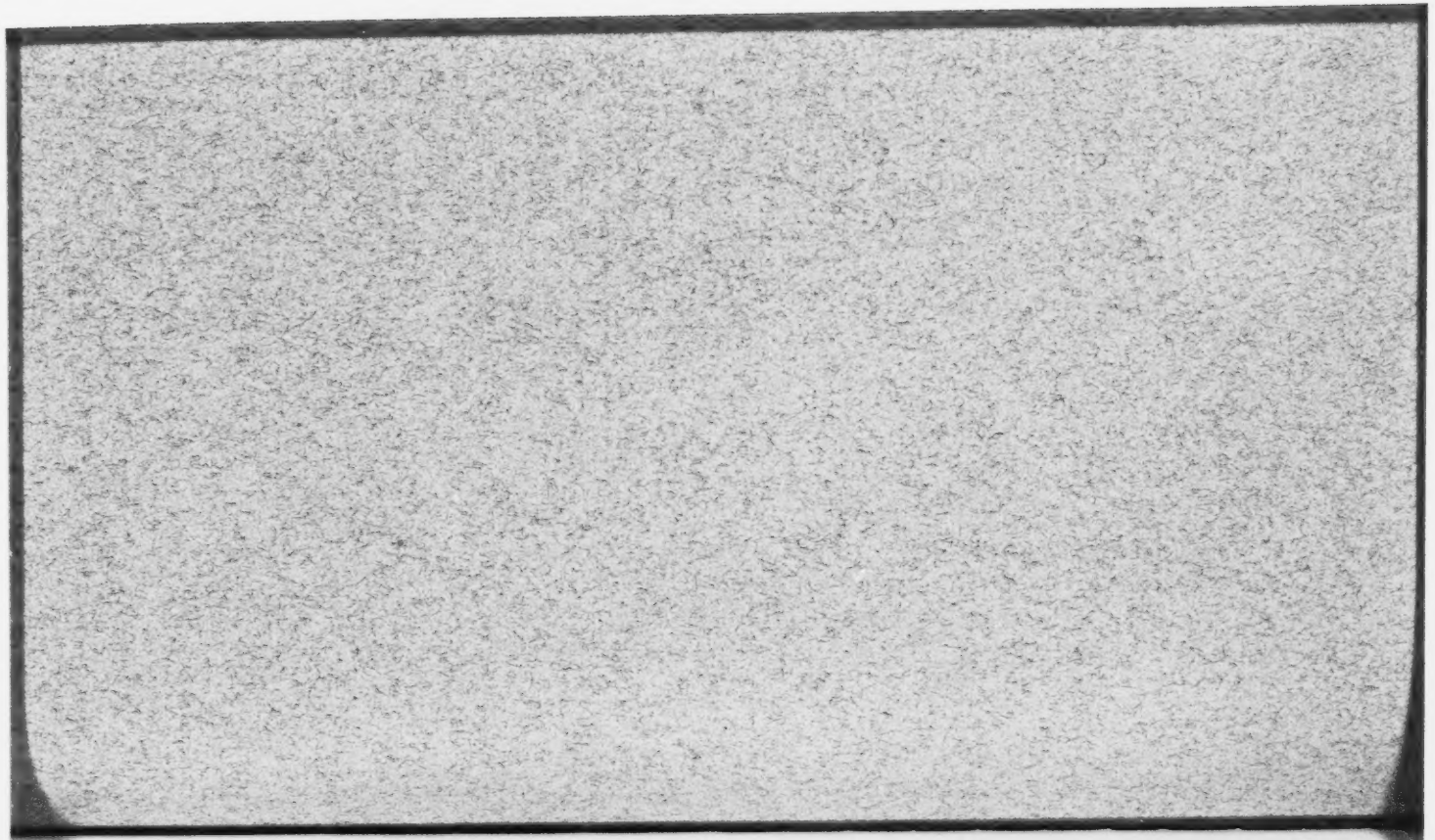
DAVID C. SHAW, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

L. D. JENNINGS,
A. S. HARBY,
Counsel for Defendant in Error.

(30,870)



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 278.

R. H. HASSLER, INC., PLAINTIFF IN ERROR,

vs.

DAVID C. SHAW, DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

This is an action for damages in which D. C. Shaw was plaintiff below and Robert H. Hassler, Inc., was defendant, commenced in the Court of Common Pleas for Sumter County, S. C., and removed to the District Court of the United States for the Eastern District of

South Carolina, in which court it was tried before District Judge Smith and a jury on November 10, 1921, at a term ending December 5, 1921 (R., 71), resulting in a verdict and judgment in favor of plaintiff below in the sum of fifteen thousand dollars.

Through inadvertence and mistake judgment was not actually entered until May 29, 1924. In the meantime, on May 8, 1924, Hassler moved before District Judge Cochran, who had succeeded Judge Smith, to set aside the verdict upon grounds not set out in the record (R., 71), which motion was refused on May 16, 1924. After entry of the judgment, a further motion was made by Hassler to vacate the judgment upon the ground that the court had no jurisdiction to try the case, which motion was refused on June 13, 1924 (R., 78). A writ of error was allowed on June 27, 1924.

The Facts.

The record contains a bill of exceptions allowed by Judge Smith (R., 26-71). The defendant in error has moved to strike out this bill of exceptions, and does not consider it properly before the court. We, therefore, at this time forbear any reference to the contents of this bill of exceptions, and shall state the facts surrounding the controversy as they otherwise appear of record.

The summons and complaint, filed in the State court on May 5, 1919 (p. 7), were served on the defendant Hassler at Indianapolis, Indiana, on May 12, 1919 (R., 4). On September 3, 1919, Hassler filed its answer in the United States Court, setting up as a first defense a

plea to the jurisdiction of the court wherein it alleged that it was a corporation of the laws of Indiana, that it does not do business in South Carolina, and had neither officers, offices or property in said State. In the same defense it further set up that on May 24 it had made a special appearance before Judge Wilson of the State court and moved to set aside the service, which motion was refused by an order, a copy of which was attached to the answer as Exhibit A (R., 6).

NOTE.—Exhibit A is printed out of order on page 5.

The same answer contained a second defense directed to the merit of the controversy (R., 6).

On February 4, 1921, the defendant Hassler gave notice of a motion to amend this answer by setting up the Statute of Frauds (R., 14). On February 21 the motion was heard, and both plaintiff and defendant were allowed to amend. An amended complaint was filed on March 14, 1921 (R., 15), which was answered by the defendant Hassler on March 31, 1921, the amended answer containing a first defense to the jurisdiction, and a second defense to the merits (R., 19).

A trial on these pleadings was had on November 19, 1921, resulting in a verdict in favor of plaintiff for $15,000.00 (R., 23). No motion for a new trial was made and no step of any kind taken by the defendant Hassler until May 8, 1924, when a motion was made by it to set the verdict aside, which was refused by Judge Cochran (R., 74). It was then discovered by the plaintiff Shaw that judgment had not been entered, due to an oversight (R., 71), and, after motion on May

29, 1924, the court allowed the judgment entered, which was done on that day.

On the same day, Judge Cochran extended the April term, 1924, for a period of sixty days for the settlement of any bill of exceptions, providing that Judge Smith should hear, determine and settle all matters as to any bill of exceptions as to proceedings had before him (R., 24).

On June 27, 1924, the defendant Hassler presented to Judge Smith a bill of exceptions as to such proceedings, to the allowance of which the plaintiff Shaw objected (R., 25). Judge Smith overruled the objections (R., 25), allowing plaintiff an exception to his order.

So much and no more is shown by the record, omitting the Bill of Exceptions settled by Judge Smith.

Assignments of Error.

The first and second assignments of error complain because Judge Smith declined to determine the question of jurisdiction and tried the case while that question was undetermined.

The remaining assignments complain because Judge Cochran refused to set aside the verdict, because he permitted the entry of judgment, and because he declined to vacate the judgment; all on the ground that the court was without jurisdiction of the person of defendant.

There are, therefore, only two questions raised, to which we reply by asserting:

A. Judge Smith did not decline to determine the question of jurisdiction.

B. Judge Cochran had no power to set the verdict or judgment aside.

C. The defendant Hassler submitted itself to the jurisdiction of the court.

The Motion to Strike Out.

Whether or not the Bill of Exceptions settled by Judge Smith shall be deemed part of the record must be decided before these issues can be discussed.

The proper manner of raising this question is by motion to strike out.

> Exporters of Manufacturers' Products, Inc., *vs.* Butterworth-Judson Co., 258 U. S., 365; 66 L. Ed., 663.

A bill of exceptions must be presented at the trial term, or within time allowed by orders entered at the term, or by standing rule of court, and after the expiration of the term; without reservation of the court's control there is no authority for the allowance of a bill of exceptions.

> U. S. *vs.* Jones, 149 U. S., 262; 37 L. Ed., 762.
>
> Michigan Ins. Bank *vs.* Eldred, 143 U. S., 293; 36 L. Ed., 162.
>
> O'Connell *vs.* U. S., 253 U. S., 142; 64 L. Ed., 827.

During the term no action was taken to reserve control of the case, and the District Judge rests his authority for settling and allowing the bill upon Rule 44 of the District Court, which provides:

> "No bill of exceptions will be settled or allowed if not presented for settlement within sixty days after the rendition of the verdict in the cause, if tried before a jury * * * unless the time be enlarged by the Court or a Judge thereof."

Nothing contained in the rule extends the time beyond the term, or reserves to the judge the authority to enlarge the time after the expiration of the term. Hence, the exercise of the power of the judge to enlarge the term must be restricted to such period as he has general control over the case, *i. e.*, the term, and after the expiration of the term, when the court loses jurisdiction over its judgments and the cause no longer depends before it, the time for presenting a bill of exceptions could not be enlarged or such bill allowed.

O'Connell *vs.* U. S. and cases cited, *supra.*

Even consent of all parties would not justify such an allowance.

Exporters of Manufacturers' Products, Inc., *vs.* Butterworth-Judson Company, *supra.*

The effect of striking out the bill will be to eliminate from the printed transcript pages appearing in the transcript between pages 26 and 71, inclusive. The record cannot be supplemented by the contents of an improvidently issued bill, which in contemplation of law is no bill, even though the matters therein contained, by proper and timely steps, could have been made part of the record.

Suydam *vs.* Williamson, 20 How., 427; 15 L. Ed., 978.

BRIEF OF ARGUMENT.

Judge Smith Did Not Decline to Determine the Question of Jurisdiction.

The assignments of error assert that the District Judge declined to determine the question of jurisdiction raised by the pleadings; not that he erroneously decided it. There is nothing in the record which supports such an assertion. On the contrary, the record shows the question was raised by the first defense to the answer and amended answer (R., 6, 19), that the case went to trial on these pleadings and resulted in a verdict in favor of plaintiff, upon which judgment has been entered (R., 78). The inference is that the jurisdictional question was either waived or decided adversely to defendant Hassler.

It is stated in the brief of plaintiff in error that the verdict was a tentative one, for the purpose of fixing the amount of the claim, and was so considered by the District Judge. This is an erroneous statement. If the bill of exceptions is stricken from the record, there is nothing before this Court to show how the verdict was considered, except the statements of Judge Cochran.

> "I find here upon the record of this Court a verdict and do not think I have the power, under the cases referred to, to review the action of my predecessor, Hon. Henry A. M. Smith, and set that verdict aside after the expiration of the term at which it was rendered" (R., 77).
>
> "However, I desire to say that as I view it, the question of jurisdiction was one of the per-

son and not of the subject matter, and could be waived, and my predecessor, Hon. Henry A. M. Smith, U. S. District Judge, did assume jurisdiction and proceeded to the trial of the cause and the rendition of a verdict by a jury. He therefore took jurisdiction" (R., 78).

On the other hand, if the bill of exceptions remains in the record, it negatives the idea of a tentative verdict.

> "The Hassler Sales Agency insisted that the issues raised by the claimant should first be disposed of.
>
> "The Court held, however, that inasmuch as much of the testimony would have to be repeated upon the trial of each of these issues, the Court would first try the main case, *being the action for damages* * * *
>
> "Thereupon the *case* proceeded and after the taking of the testimony presented by both sides, the argument of counsel and the charge of the judge, resulted in a verdict of fifteen thousand dollars against the defendant, R. H. Hassler, Inc." (R., 64).

In the decree of Judge Smith on the intervention, he says:

> "The claimant sought to have the issue as to the validity of the attachment tried first, but inasmuch as it seemed to the Court that under the pleadings, much of the testimony would have to be repeated on each trial, and that it would be best in the speedy administration of justice that it should be first determined *whether the plaintiff could recover any judgment at all* against the defendant, Robt. H.

Hassler, Inc., that issue was directed to be tried first.

"Thereafter, at the November, 1921, term of this Court, the *main cause* herein between David C. Shaw, the plaintiff, and Robert H. Hassler, Inc., the defendant, came to trial before the Court and a jury, and a verdict for fifteen thousand dollars in favor of the plaintiff, David C. Shaw and against the defendant, Robert H. Hassler, was rendered by the jury; as to which no new trial has ever been granted, nor has any appeal or writ of error therefrom been taken" (R., 66). (Italics supplied.)

The language leaves no doubt that Judge Smith regarded the verdict as a final determination of the question of whether or not plaintiff *could* recover. There is no suggestion of a tentative submission here.

As a matter of fact, the verdict was never regarded by the plaintiff below as in any sense conditional, nor was it ever held by Judge Smith that judgment on this verdict should depend upon the issue as to the ownership of the attached property. In fact, Judge Smith expressly ordered that the question of waiver be decided with all other questions in the case at the trial of the *case on the merits* (R., 41). When the trial which resulted in the verdict was had, there is nothing in the record to show the preservation of any exception to Judge Smith's decision, or even that the point was made. At any rate, Judge Smith assumed jurisdiction, and no assignment of error complains of his so doing. The assignments allege he failed to determine the question, not that he determined it erroneously.

The fact that the record discloses no stipulation of counsel that the verdict be conditional, no order of the court compelling the defendant below to go to trial on this issue prior to the determination of the jurisdictional question, no exception of any kind to the action of the Judge in proceeding with the trial, and no assertion by the defendant below at the trial of its immunity from suit, together make a conclusive showing that in fact the position now assumed by the plaintiff in error was never taken in the court below, and that the determination of the trial by a verdict of the jury upon which judgment was duly entered must be considered as to the issue of jurisdiction in the same light as it is entitled to consideration, as a determination of every other issuable matter presented by the pleading.

The plaintiff in error in its brief undertakes to argue that Judge Smith was in error in deciding the jurisdictional question adversely to it, just as if an exception had been noted on this point, and the question presented to this Court by an assignment of error. In our view the rulings of Judge Smith on this point are not before this Court for no less than three reasons: (1) The record fails to show what these rulings were; (2) the record fails to show any exception to these rulings, and (3) the assignment of error covers no one of these rulings.

In its brief the plaintiff in error argues that certain excerpts from the charge of the court upon the trial which resulted in a mistrial became the law of the case and remained so, and that the plaintiff in error was entitled to and did rely upon them as the law. In the first place, this charge is not properly before this

Court, for the reasons assigned in the motion to strike out the bill of exceptions. In the second place, we are unable to agree with counsel in the conclusion that instructions to the jury upon a trial which results in a mistrial are binding upon any one as the law of the case. This is indeed a novel proposition, and we note from counsel's brief is without the support of any cited authorities.

Needless to say, we disagree with the statements contained on page 11 of the brief of plaintiff in error, to the effect that the verdict in this case was subject to the Court's reservation of the jurisdictional question, and could not be called a complete and valid verdict. The record shows no such reservation, and so far as the defendant in error then knew or now knows the verdict was a complete and final determination of all issues of law and fact raised by the pleadings between the plaintiff and Robt. H. Hassler, Inc., subject to such review of errors of law as might be had in this Court. The verdict did not conclude the intervenor, Hassler Sales Agency, which was not party to the trial, nor did the trial of the question of title between plaintiff and the intervenor conclude the defendant Hassler, nor the plaintiff as regards the defendant Hassler.

To Summarize: The jurisdictional question was neither ignored nor passed over; the verdict was in no sense tentative or conditional; but was a final determination of all issues plead, and the only inference to be drawn from the record is either that the question of jurisdiction was decided against plaintiff in error, or was waived by it.

Judge Cochran Had No Power to Set the Verdict or Judgment Aside.

The verdict was rendered November 10, 1921, during the term which expired on December 5, 1921. No motion for a new trial was made, nor were any other proceedings taken to reserve to the court control over the case. The application to Judge Cochran was not made until May 8, 1924, long after the expiration of the term. The grounds of the application are not stated in the record, but sufficient appears from Judge Cochran's order (R., 74) to show that the case falls within no exception to the general rule that after the expiration of the term, the court is without power to set aside or modify a verdict or judgment rendered during the term. Judge Cochran cites in support of this rule, Harley *vs.* U. S., 269 Fed., 384; U. S. *vs.* Mayer, 236 U. S., 55; Abbott *vs.* Brown, 241 U. S., 606; *In re* Metropolitan Trust Co., 218 U. S., 312; Greyer-Biehl *vs.* Hughes Electric Co., 294 Fed., 802. In addition to these cases, we call the attention of the court to Wetmore *vs.* Karrick, 205 U. S., 141; 51 L. Ed., 745. The opinion in this case contains an elaborate review of previous decisions of the United States Supreme Court, which may be summarized in the quotation from Bronson *vs.* Schulten, 104 U. S., 410; 26 L. Ed., 797, as follows:

> But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or cor-

rect them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.

We call attention to Phillips *vs.* Negley, 117 U. S., 665; 29 L. Ed., 1013. In this case the court says, commenting upon the decision in Bronson's case:

> "Although the opinion (Bronson case) also shows that upon the facts of that case the action of the circuit court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court.

> 'No principle is better settled,' it was said in Sibbald *vs.* United States, 12 Pet., 488, 492; 9 L. Ed., 1167, 1169, 'or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron *vs.* M'Roberts, 3 Wheat., 591; 4 L. Ed., 467; Bank of Commonwealth *vs.* Wistar, 3 Pet., 431; 7 L. Ed., 731), or to reinstate a cause dismissed by mistake (The Palmyra, *supra*): from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.' ''

We further call attention to the case of Bank of the United States *vs.* Moss, 6 How., 31; 12 L. Ed., 331. In this case, after the expiration of the term, the Circuit Court, on motion of defendant, set aside a verdict and dismissed a case for what it considered to be a want of jurisdiction. The plaintiff below excepted, and the Supreme Court of the United States, speaking through Mr. Justice Woodberry, held that the power of the Circuit Court had been exhausted and ended with the expiration of the term, and that after the term the court was without authority to change its decision or reverse it.

The case of Tubman *vs.* B. & O. Railroad Co., 190 U. S., 38; 47 L. Ed., 946, affirms Bronson *vs.* Schulten, and Phillips *vs.* Negley.

The Court Obtained Jurisdiction Over the Defendant Hassler.

It is the contention of the defendant in error that the District Court acquired jurisdiction over the defendant Hassler regardless of the method employed in serving the summons and complaint, by (*a*) the plea of said defendant to the merits of the case before the question of jurisdiction was determined, and (*b*) the failure of the defendant to raise any exception to the jurisdiction of the court upon the trial of the case.

If the bill of exceptions be stricken out in accordance with the motion made, the record shows merely that the defendant in the first instance appeared by answer containing objections to the jurisdiction of the court and a general defense to the merit, upon which it went to trial without making any exception to the court's rule on the jurisdictional point, or without preserving this ruling, and attempts now, after all other issues are decided against it, to raise the question of jurisdiction of its person in this Court.

If, on the other hand, the motion to strike out the bill of exceptions fails, the record shows that the summons and complaint were served personally upon defendant, though such service was made without the State of South Carolina. Thereafter the defendant appearing especially in the State court moved to set aside the service. The motion was refused without prejudice, leaving the question of jurisdiction still open. Promptly thereafter the defendant filed in the State court a petition and bond for removal. There-

after, without renewing its motion to set aside the service, or without saving the right to do so, the defendant filed its answer, which contained a first defense to the jurisdiction of the court, and a second defense upon the merits. Thereafter the cause was tried, at which trial the court refused to direct a verdict in favor of the defendant on the question of jurisdiction, and refused to peremptorily charge the jury that the court would have no jurisdiction if the attached property was not that of the defendant Hassler. This trial resulted in a mistrial, and when the cause came on for trial again the record shows that the defendant entered into the trial, offered testimony and took no steps to raise the jurisdictional question, or to except from the Judge's rulings thereon, or to preserve its rights under the first defense of its answer.

In support of its position, the defendant in error advances the following points:

1. The question involving the jurisdiction of a Federal court is not controlled by State statutes or decisions.

Mechanical Appliance Co. *vs.* Casselman, 215 U. S., 437; 54 L. Ed., 272.

Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called Conformity Act, neither the statutes of the State nor the decisions of its courts are conclusive upon the Fed-

eral courts. The ultimate determination of such questions of jurisdiction is for this Court alone.

See also

Western Loan & Savings Co. *vs.* Butte and Boston, etc., 210 U. S., 681; 52 L. Ed., 1101.

2. The suit being one between a resident of South Carolina and an Indiana corporation, United States District courts in either South Carolina or Indiana had general jurisdiction of the subject matter of the action. Defendant's privilege to be sued in Indiana could have been waived.

Ex parte Schollenberger, 96 U. S., 378; 24 L. Ed., 853 (quoted in *Ex parte* Moore, *infra*).

The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the court. It is rather in the nature of a personal exemption in favor of the defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented.

Gracie *vs.* Palmer, 8 Wheat., 699; 5 L. Ed., 719.

Toland *vs.* Sprague, 12 Pet., 300; 9 L. Ed., 1093.

First Nat'l Bank *vs.* Morgan, 132 U. S., 141; 33 L. Ed., 282.

St. Louis, etc., R. Co. *vs.* McBride, 141 U. S., 127; 35 L. Ed., 659.

Central Trust Co. *vs.* McGeorge, 151 U. S., 129; 38 L. Ed., 98.

3. Filing a petition for removal was such a waiver, and amounted to a consent to the jurisdiction of this Court.

Ex parte Moore, 209 U. S., 490; 52 L. Ed., 904 (overruling *Ex parte* Wisner, 203 U. S., 449).

Moore, a citizen of Illinois, instituted this case in the State courts of Missouri against the L. & N. R. R. Co. Thereafter, on petition of the defendant, the case was removed to a United States District Court in Missouri. Moore filed an amended petition in that court, and entered into various stipulations as to continuing the case from time to time. Subsequently, he moved to remand, upon the ground that neither he nor the defendant were residents of Missouri, and the cause could not have been brought in that State. The Supreme Court held that, since there was a diversity of citizenship, District courts generally had jurisdiction, and the provisions of the statute as to the particular district in which the action should be maintained could be, and had been waived by both plaintiff and defendant.

In part, the court said:

> "That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the state to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter Court could be had * * *
>
> "As held in Kinney *vs.* Columbia Sav. & L. Asso., 191 U. S., 78; 48 L. Ed., 103, a petition and bond for removal are in the nature of pro-

cess. They constitute the process by which the case is transferred from the state to the Federal court, and if, when the defendant is brought into a Federal Court by the service of original process, he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal Court by the process of removal, may in like manner, waive his objection to that court. So long as diverse citizenship exists, the circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a circuit court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the circuit courts as a class, that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction."

4. Defendant's plea to the merits of the case was also a waiver, and submitted it to the jurisdiction of the court.

St. Louis Ry. Co. *vs.* McBride, 141 U. S., 127; 35 L. Ed., 659.

In this case, plaintiffs, citizens of Arkansas, brought suit in the Circuit Court for the Western District of Arkansas against the defendant Railway Company, a corporation and citizen of Missouri. The first plea made by the defendant was a demurrer on three grounds: First, because the court had no jurisdiction of the person of the defendant; Second, because the

court had no jurisdiction of the subject matter of the action, and Third, because the complaint did not state facts sufficient to constitute a cause of action. The Supreme Court said, in disposing of the jurisdictional questions on writ of error:

> "Assuming that service of process was made * * * and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction *alone* but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."
>
> Interior Const. & Imp. Co. *vs.* Gibney, 160 U. S., 217; 40 L. Ed., 401.

> "The circuit courts of the United States are thus vested with general jurisdiction of civil actions involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record, the court of its own motion will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceeding taken to

bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection. (Citing cases.)"

Western Loan & Savings Co. *vs.* Butte & Boston Min. Co., 210 U. S., 368; 52 L. Ed., 1101.

In this case, suit was brought in the District of Montana, jurisdiction being based solely on diversity of citizenship of the parties, the plaintiff being a citizen of Utah and the defendant of New York. The defendant filed a demurrer, alleging, 1st, that the court had no jurisdiction of the subject of the action; 2d, the court had no jurisdiction of the person of the defendant; 3d, that the complaint did not state facts sufficient to constitute a cause of action; 4th, that the complaint was uncertain, and, 5th, that the complaint was unintelligible.

The sole question reviewed by the Supreme Court was whether or not the Circuit Court had jurisdiction. In holding that it had, the court enunciates the following propositions:

1st. That where diversity of citizenship exists, so that the suit is cognizable in some circuit court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits.

2d. That notwithstanding the Conformity Act, the statutes and decisions of the State do not control, but the question is to be determined *altogether* and finally by the practice in the Federal courts as set forth in the decisions of the Federal Supreme Court.

3d. That the defendant by filing the demurrer on the grounds stated waived the question of jurisdiction.

The court follows the decision in the McBride case, *supra*, and points out that the defendant was at liberty to make a special appearance by motion aimed at the jurisdiction of the court over its person.

See also

Texas and Pacific Railroad Co. *vs.* Cox, 145 U. S., 593; 36 L. Ed., 827.

5. The order of Judge Wilson did not foreclose the waiver.

Defendant relies upon the order of Judge Wilson in the State court, which refused a motion to set aside the service of the summons "without prejudice, however, to the right of defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable."

This proviso manifestly conferred no new rights on defendant. It merely left the way clear for it to assert the alleged lack of jurisdiction of the court, provided it did not waive its right to so do. Had the defendant set up nothing in its answer after its "first defense," Judge Wilson's order would not have precluded a consideration and decision of that defense. It is not

Judge Wilson's order now that precludes a consideration of these matters, but defendant's own act in joining with his "first defense" a plea to the merits of the action. Judge Wilson's order did not give him the right to do that.

6. The defendant further submitted itself to the jurisdiction of the court by going to trial without saving an exception as to the court's ruling on this point.

It appears from the record that although the defendant raised the issue of jurisdiction in its answer, there is no exception preserved as to Judge Smith's ruling on this question upon the trial of the case. It does not appear from the record that Judge Smith was called upon to rule upon it, and this case is brought within the rule announced in the case of German Alliance Insurance Co. *vs.* Hale, 219 U. S., 307; 55 L. Ed., 229, where the Supreme Court said:

> "The defendant did not stand upon his plea, and went to trial upon the merits of the case, without objection, and introduced evidence upon other issues in the case, but at the trial no evidence was offered or introduced on either side relating to the matters set out in the second plea. Under these circumstances, we are not required to consider the questions raised by that plea. On this record we may fairly assume that the defendant at the trial waived or abandoned the issues raised by the plea. Garrard *vs.* Reynolds, 4 How., 123; 11 L. Ed., 903, 905; Weed *vs.* Crane, 154 U. S., 570, and 19 L. Ed., 712; 14 Sup. Ct. Rep., 1215."

7. The decisions cited by plaintiff in error on the issue of waiver are totally inapplicable.

The plaintiff in error apparently relies upon Sections 406-7, South Carolina Code of Civil Procedure, as well as several decisions of the Supreme Court of the United States. The State statute is, of course, entirely inapplicable, as shown by the authorities herein contained, to the effect that notwithstanding the Conformity Act, State statutes are not binding upon the Federal court. The case cited by plaintiff in error of Mexican Railroad Co. *vs.* Pinkney, 149 U. S., 194, also establishes this. In the Pinkney case a statute of the State of Texas was disregarded, although under its terms the defendant had made a general appearance.

The general authorities cited by plaintiff in error on this point, to wit: Harkness *vs.* Hyde, 98 U. S., 476; Southern Pacific Co. *vs.* Denton, 146 U. S., 202, are various decisions to the same effect, are totally beyond the point for the reason that in all of these cases there was in the first instance an appearance in the Federal court by a plea to the jurisdiction or motion to set aside the service, and it was not until such plea or motion had been overruled that a further appearance was made.

In the case at bar, the first appearance in the Federal court included a plea to the merits of the case. While a motion to set aside the service was made in the State court, the merits of this motion were never determined, but it was merely refused without prejudice, which left the parties in the same plight as if the motion had never been made. In such cases the only proper practice would have been to have renewed the motion in the

Federal court, reserving the right to do so in a petition for removal. It is manifestly unfair for the plaintiff in error to have appeared upon the merits of the case, and to have joined issues in a litigation which has now extended over a period of more than five years, and after being defeated, upon the merits, at this late day to insist that the court is without jurisdiction.

Conclusion.

On the whole case it is most respectfully submitted that the bill of exceptions appearing in the record as to proceedings before Judge Smith should be stricken out; that the question of jurisdiction cannot be considered by this Court, for the reason that no exceptions were reserved to the action of the trial judge in assuming jurisdiction of the cause and trying the issues raised by the pleadings; that the verdict is in no way a conditional one; that, as a matter of fact, the court had jurisdiction of the subject matter, and obtained jurisdiction over the defendant Hassler by reason of it submitting itself to that jurisdiction. It is further respectfully submitted that Judge Cochran had no power to set the verdict or judgment aside, and that for these reasons the judgment of the court below should be affirmed.

Respectfully submitted.

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